DOCKET NO. X03-CV11-6032094-S	:	SUPERIOR COURT
JAMES DESALLE, ET AL.	:	COMPLEX LITIGATION
VS.	:	DOCKET AT HARTFORD
WAL-MART STORES EAST LP, ET AL.	:	SEPTEMBER 22, 2016

MEMORANDUM OF DECISION ON
MOTION FOR SUMMARY JUDGMENT BY
WAL-MART STORES EAST, LP

The court assumes familiarity with the facts at issue in this lawsuit, as well as familiarity with the legal issues in, and procedural history of, this case. Defendant Wal-Mart Stores East LP (hereinafter Wal-Mart) moved for summary judgment (Nos. 193 and 194) on plaintiffs' then-operative complaint (No. 129).

Wal-Mart's motion was based primarily on a claim that, in the context of this case, plaintiffs had failed to allege properly that Wal-Mart was a "product seller" within the meaning of the Connecticut Product Liability Act, CGS Sec. 52-572m, *et seq*. Plaintiff thereafter filed a request for leave to file another amended complaint (No. 214), which amended Paragraph 18 of the first count to, among other things, add three new allegations of wrongful conduct (subparagraphs g through i) to the existing list of allegations (¶ 18). The proposed amended complaint also added a second count alleging negligence against Wal-Mart.

The defendant[1] filed a timely objection to the request for leave to amend (No. 217), which this court previously overruled, finding that the new allegations "relate back" to the allegations of the original complaint. In this motion, defendant challenges the amended

[1] Plaintiffs have withdrawn their claims against Cooper Tire, leaving Wal-Mart as the sole remaining defendant.

complaint because it submits that it was improper for plaintiffs to seek to amend their complaint as part of their opposition to this motion. The court disagrees.

This motion for summary judgment is essentially an attack on the legal sufficiency of plaintiffs' pleadings as of the date of their then-operative complaint (No. 129, filed on 8/12/11). There is nothing unusual under our rules of practice about using the motion for summary judgment as a means of attacking the sufficiency of a complaint, if a party has waived its right to file a motion to strike by filing a responsive pleading. *Grenier v. Commissioner of Transportation,* 306 Conn. 523, 535 n. 10 (2012).

Obviously, a nonmoving party that loses a motion to strike has an opportunity to replead, while our rules pertaining to motions for summary judgment contain no such provision. Our appellate courts have recognized this problem and have permitted parties in this situation to replead their cases. *American Progressive Life & Health Insurance Co. of New York v. Better Benefits, LLC,* 292 Conn. 111, 124-25 (2009).

The court therefore concludes that plaintiffs' amendments to their complaint filed after the motion for summary judgment was filed were legally proper, and the court will consider defendant's motion as it applies to that subsequent complaint. This analysis is not difficult regarding the "new" Second Count, which is a common law negligence claim against Wal-Mart, which this court has already found to relate back to the original complaint. As this court held in its previous decision about the Second Count (217.86), the defendant's challenge to its status as a "product seller," which will doubtless continue after this court's action on this motion, would make it demonstrably unfair for this court to deny plaintiffs the opportunity to plead their case in

the alternative. A final decision as to whether this negligence claim goes to the jury may well need to wait until the evidence is complete.

This court finds that defendant's claim that, as a matter of law, it was not a "product seller" as defined under the CPLA also involves issues of fact that may well need to be resolved by a jury. The record before this court, as presented by the defendant, does not tell it nearly enough about what the defendant's employees did when they serviced plaintiffs' vehicle on February 13, 2009, to permit it to determine, at this point, whether or not Wal-Mart was acting as a "product seller." The Product Liability Act obviously lists installers among the types of people who can fall under the definition of "product seller." Once again, a resolution of this issue will probably require a full exploration of what Wal-Mart's employees did – and perhaps did not do – before a jury can reach an informed decision.

The motion for summary judgment is therefore denied. It is so ordered.

/S/ Miller, J.